Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996	)	
	)	CC Docket No. 96-115
Telecommunications Carriers' Use	)	
Of Customer Proprietary Network	)	
Information and Other Consumer Information	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, As Amended	)	

REPLY COMMENTS OF THE PROGRESS & FREEDOM FOUNDATION

The Progress & Freedom Foundation ("PFF" or "Foundation") hereby submits these reply comments in response to the Notice of Proposed Rulemaking in this proceeding.[1] The Foundation has conducted extensive research into issues relating to privacy and the regulation of commercial information,[2] and offers these comments in order that the Commission may have the benefits of considering the results of that

[1] *In the Matter of Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Consumer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended,* FCC 01-247, CC Docket No. 96-115, August 28, 2001 (hereinafter "NPRM"). The views contained in these comments are the views of the comments' authors and do not necessarily reflect the views of the directors, officers, or staff of the Foundation.

[2] See especially, Paul H. Rubin and Thomas M. Lenard, *Privacy and the Commercial Use of Information* (Boston: The Progress & Freedom Foundation and Kluwer Academic Press, 2002). Lenard, one of the authors of these comments, is Vice President for Research at The Foundation, while Rubin is a Senior Fellow.

research in its deliberations over the treatment of Customer Proprietary Network Information ("CPNI").

The Foundation's research has shown, as a general matter, that the free flow of commercial information has substantial benefits for consumers and is important to the functioning of competitive markets. Furthermore, the Foundation's work demonstrates that, despite concerns among consumers about the impact of new digital technologies on the expectations of privacy, broadly defined, there is no systematic evidence, or even strong anecdotal evidence, of consumer harm associated with legal uses of commercial information. Third, our research demonstrates that businesses have strong incentives to respond to consumer concerns about how their information is used, and with whom it is shared, and that, indeed, the private sector has responded to consumer concerns by voluntarily adopting privacy policies and taking other appropriate steps. Finally, and of particular relevance to this proceeding, the Foundation's research strongly suggests that, as a general matter, mandated opt-in rules are detrimental to consumers and to the economy overall. Accordingly, we strongly disagree with the views expressed in a filing submitted in this proceeding by a group of "privacy advocates" led by the Electronic Privacy Information Center ("EPIC"), and urge the Commission to eschew an opt-in requirement.

Few issues have plagued Congress and regulators as much as privacy. The Federal Communications Commission's consideration of CPNI is no exception. The 10th Circuit's decision in *U.S. West v. FCC*[3] provides valuable guidance that must direct the Commission's further consideration of the issue. Followed properly, that decision will guide the Commission toward interpretations of the relevant statutory sections that

carry out Congress' will consistent with both the Constitution and good information policy. In particular, we ask the Commission to consider these comments in light of the Court's admonition that "the specific privacy interest must be substantial, *demonstrating that the state has considered the proper balancing of the benefits and harms of privacy.*" Thus, we urge the Commission to consider the benefits of free information flows and the "harms," as the court put it, of excessive regulation as would be represented by an opt-in approach to CPNI.

Part of the reason that policy-makers struggle so mightily with privacy is because of its subjectivity and the extent to which perceptions and preferences regarding privacy vary widely among individuals. "Privacy" in some sense evidently motivated Congress' enactment of §222 of the Communications Act. The use of the word "privacy" alone, however, did not identify the interests the statutory section was intended to serve, as the *U.S. West* court found. A legal interest is generally the right to be free from the interference of others in some activity, possession, or state of being. Legal interests generally protect citizens from coming to some kind of recognizable harm. Thus, the privacy torts — adopted throughout the United States by statute or common law — identify a legal interest in freedom from embarrassment or mortification at the disclosure or facts one has maintained in confidence.

It is fair to assume that Congress acted with some beneficial purpose, but the language of § 222 leaves one to guess. That section refers to "marketing" in subsection (b), from which one could infer that the 'privacy' notion advanced by the statute was freedom from marketing communications. This interest evidently motivates the comments of pro-regulation privacy activists (Electronic Privacy Information Center *et*

[3] 182 F.3d 1224 (10th Cir. 1999).

al.), who count among their numbers a group called "Junkbusters"[4] which is dedicated to curtailing marketing communications. By limiting the ability of telecommunications providers to use CPNI — the theory appears to go — the CPNI rules will, *prima facie*, make consumers better off.

In its application of the *Central Hudson* test to the CPNI rules, the 10th Circuit rejected the notion that less information (hence more "privacy") is always in the best interests of consumers. The 10th Circuit's request for a clear articulation of the interests advanced by the CPNI rules receives no response in comments from the pro-regulation privacy activists, who do not identify a harm that 'opt-in' CPNI rules would prevent.

The other side of the equation, of course, are benefits to consumers. Foundation scholars Paul H. Rubin and Thomas M. Lenard found a variety of benefits to consumers in their extensive economic study, *Privacy and the Commercial Use of Personal Information*. Referring to marketing communications, they found that "[c]onsumers benefit from receiving information that is targeted to their interests, as well as from not receiving information that is not of interest to them."[5] In other words, information allows communications to be targeted to make it more likely that consumers are made aware of goods and services they want to reach them, while reducing consumer exposure to unwanted or irrelevant advertising.

In addition, and specifically responsive to the Commission's interest in promoting competition in telecommunications markets, Rubin and Lenard find that the availability of consumer information for marketing communications increases competition and diversity. Conversely, "[r]egulation that raises the costs of advertising and obtaining

[4] *See* http://www.junkbusters.com/.
[5] Rubin & Lenard at xii.

customer lists would have an adverse effect on new entrants . . . . [because] advertising typically benefits new entrants. . . ."[6]

The impact of an opt-in regime would be to severely curtail the availability of CPNI for marketing purposes and thus curtail consumer choice and accrue to the detriment of consumers. Indeed, citing testimony submitted to the Federal Trade Commission, Rubin and Lenard point out that:

> The available evidence indicates that the vast majority of consumers accept the default. In testimony before the FTC on the experience of one firm, a witness indicated that, when the default rule was opt-in, 85 percent of consumers chose not to provide their data. In contrast, 95 percent chose to provide their data when the default was opt-out. *Thus, requiring opt-in would dramatically reduce the amount of information available to the economy and would impose substantial costs on consumers*.[7]

Rubin and Lenard are not alone in this finding. Studies by such respected scholars as Fred Cate, Eli Noam and Hal Varian have reached similar conclusions.[8] Furthermore, the implications of an opt-in regime in this specific instance are also known: A US West telemarketing campaign was able to obtain an opt-in rate of only 29 percent, at a cost of $20.66 per positive response.[9]

Finally, law and regulation premised on limiting marketing communications directly conflicts with the First Amendment, as the 10th Circuit found. Absent a harm to consumers that can be articulated — indeed, in the face of consumer benefits from communication of true facts — arguments that the CPNI rules comport with the First Amendment fall flat. The 10th Circuit called for "the proper balancing of the benefits and

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[6] Rubin & Lenard, p. 186.
[7] Rubin & Lenard, p. 72. (Emphasis added, internal citation omitted.)
[8] See Rubin & Lenard, pp. 71-74 for citations.
[9] Rubin & Lenard, p. 73, citing Michael Turner, "The Impact of Data Restrictions on Consumer Distance Shopping."

harms of privacy." The CPNI rules put government-mandated secrecy aimed at curtailing speech at odds with a variety of consumer benefits.

Privacy is best delivered by consumers acting in their own interests in the marketplace by choosing the information-restricting and information-sharing options that best suit them. Firms have strong incentives to meet consumer preferences with respect to privacy. Indeed, Rubin and Lenard specifically find that "the market is responding to consumer concerns about privacy in a number of ways."[10]

With the assistance of the 10th Circuit's decision in *U.S. West v. FCC*, the Commission should address the CPNI issue with an eye towards whatever genuine interests are advanced by the statute. As the court said, those interests must be weighed against the countervailing benefits to consumers from the use of information in marketing communications. The Commission should not indulge unfounded claims that marketing to consumers harms them or their privacy. Instead, it should recognize that there are myriad benefits to consumers from permitting firms to put information about their customers to work to provide better services and facilitate entry into new markets.

[10] Rubin & Lenard, p. 47 and, generally, Ch. 4, "Market Reactions to Consumer Concerns."

Respectfully submitted,

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